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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION
13

14 3taps, Inc.,
15 Plaintiff,
16 vs.
17 LinkedIn Corporation,
18 Defendant.

Case No. 18-cv-00855-EMC

**DEFENDANT LINKEDIN'S NOTICE
OF MOTION & MOTION TO DISMISS
PLAINTIFF'S SECOND AMENDED
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Judge: Hon. Edward M. Chen
Hearing Date: October 27, 2022
Hearing Time: 1:30 p.m.
Ctm: Courtroom 5
Trial Date: None Set

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NOTICE OF MOTION AND MOTION

**TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA AND TO ALL PARTIES AND THEIR
COUNSEL OF RECORD: PLEASE TAKE NOTICE** that on October 27, 2022, at 1:30 p.m., or as soon thereafter as the matter may be heard in the above-captioned Court, Defendant LinkedIn Corporation (“LinkedIn”) will and hereby does move pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure to dismiss the Second Amended Complaint (“SAC”) filed by Plaintiff 3taps, Inc. (“3taps”). This Motion is based on the concurrently filed Memorandum of Points and Authorities in support, the SAC, the Declaration of Daniel Justice and accompanying exhibits, and the Request for Judicial Notice and accompanying exhibits, filed herewith; and any other material the Court deems proper and just.

Plaintiff’s SAC seeks declaratory relief that if it engages in data scraping activity at some point in the future it will not be in violation of the Computer Fraud and Abuse Act or California Penal Code Section 502, and that such activity would not breach a contract, or be a trespass in violation of California common law. The SAC should be dismissed because there is no Article III case or controversy between the parties and, accordingly, this Court lacks subject matter jurisdiction. First, 3taps is a void corporation, and, as such, does not have capacity to bring suit not incident to winding up of its business. Second, 3taps alleges no immediate concrete harm, the hallmark requirement of standing to maintain suit. Third, there is no actual case or controversy between 3taps and LinkedIn because there is no ripe dispute. Finally, in all events, the Court should exercise its considerable discretion to dismiss this declaratory relief action. 3taps misrepresented the nature of this purported dispute to avoid another judge of this Court and [REDACTED]

[REDACTED] 3taps has been given two opportunities to fix its deficient complaint. It has failed to do so because the complaint is not capable of being fixed. The Court should dismiss the SAC with prejudice.

MEMORANDUM OF POINTS AND AUTHORITIES**INTRODUCTION**

This is the third complaint 3taps has filed in pursuit of an advisory declaration that it may engage in some unspecified future scraping activity without violating various legal doctrines. This Court dismissed 3taps's prior complaint for lack of standing/ripeness, but gave 3taps a chance to amend to plead facts substantiating an actual case or controversy between the parties. Once again, 3taps fails to do so. 3taps lacks standing and continues to assert abstract, unripe claims. Its case should be dismissed.

3taps's first problem is one of its own making—years of failing to pay its taxes led the Delaware Secretary of State to declare 3taps a void corporation, which it remains today. The consequence of that declaration is that 3taps lacks capacity to bring any lawsuit not incident to winding up its business. This case, which seeks a declaration that supposedly would allow 3taps to engage in future business conduct, has nothing to do with winding up the affairs of the company. Accordingly, Delaware law (which controls for purposes of determining capacity to sue) deprives 3taps of the power to pursue its claims.

Second, as with its prior pleadings, 3taps continues to make no plausible allegation showing that it has suffered or is threatened with immediate and concrete harm. 3taps does not allege that it has scraped LinkedIn or used LinkedIn data in any way. 3taps repeats the same mischaracterizations of a single pre-suit letter from LinkedIn, but no matter how many times 3taps alleges otherwise, that letter (which was sent only in response to correspondence initiated by 3taps) makes no threat of action whatsoever against 3taps.

Third, 3taps cannot show a ripe dispute because it fails to allege the existence of a substantial, immediate, and real controversy. In granting leave to amend, the Court cautioned 3taps that it “must provide non-conclusory allegations as to how [3taps] has engaged in meaningful preparation to conduct data scraping activity.” ECF No. 67 at 1. The Second Amended Complaint (“SAC”) once again does not contain any such allegations. Rather than plead meaningful preparation, 3taps directs the Court to its website, which 3taps says is an online data shop for developers. But—consistent with 3taps's status as a void corporation—the

1 “Developers” portion of its website contains nothing but dead links. The only active pages of
 2 3taps’s website are the pages devoted to 3taps’s scraping advocacy, which confirms the advisory
 3 nature of 3taps’s request for relief in this case. And while 3taps suggests it may have one
 4 commercial opportunity that it would act on if it obtains a favorable ruling, [REDACTED]
 5 [REDACTED]
 6 3taps cannot explain why it needs the advisory relief it seeks here in order [REDACTED]
 7 [REDACTED] particularly when 3taps is not legally allowed to engage in
 8 business of any kind due to its charter having been declared void.

9 Finally, even if there were subject matter jurisdiction over this declaratory relief action
 10 (which there is not), the Court should exercise its inherent discretion to decline jurisdiction.
 11 There is no reason to hear a dispute brought by a void company concerning the propriety of
 12 theoretical conduct it has never once engaged in. Moreover, 3taps’s attempt to manufacture a
 13 future business opportunity [REDACTED] echoes 3taps’s attempt
 14 to manufacture a relationship with hiQ in order to have this case assigned to Judge Chen, rather
 15 than Judge Breyer, who had previously enjoined 3taps and Mr. Kidd personally from scraping.
 16 3taps’s pursuit of this lawsuit is nothing more than an advocate’s attempt to have the Court say
 17 that the law is what 3taps wants it to be. This Court should not expend its limited resources on a
 18 purely advisory matter that lacks any tangible, ripe dispute.

19 **STATEMENT OF FACTS**¹

20 **A. 3taps’s Manufactured Relationship With hiQ.**

21 Plaintiff 3taps’s primary investor and CEO is an individual named Robert Gregory (“Greg”)
 22 Kidd. *See* Dkt. 1-1 (Supplemental Disclosure Regarding Interest in the Appeal of Amicus Curiae
 23 3taps, Inc.). Mr. Kidd is also a significant investor and the President of another entity called Hard
 24 Yaka, Inc. (“Hard Yaka”). *See id.* (“Mr. Kidd is also a significant investor in Hard Yaka, Inc.”);
 25 Justice Declaration Ex. A (Redacted excerpts of HiQ Labs, Inc. Series C Preferred Stock
 26

27 ¹ On a Rule 12(b)(1) motion, the Court may consider factual material outside the pleadings so
 28 long as reasonable inferences are drawn in the plaintiff’s favor. *Edison v. United States*, 822 F.
 3d 510, 517 (9th Cir. 2016).

1 Purchase Agreement, signed by Mr. Kidd on behalf of Hard Yaka as its President). According to
 2 the SAC in this case, Hard Yaka is an investor in 3taps. See Dkt. 68 (3taps, Inc.’s Second
 3 Amended Complaint for Declaratory Judgment Against LinkedIn Corporation) ¶14. Thus, it
 4 appears Mr. Kidd is both the primary investor and lead executive of both plaintiff 3taps and Hard
 5 Yaka.

6 On June 30, 2015, 3taps, Hard Yaka, and Mr. Kidd were permanently enjoined from
 7 scraping Craigslist.com by another judge of this Court. See LinkedIn’s Request for Judicial
 8 Notice (“RJN”) Ex. 1 (*Craigslist, Inc. v. 3taps, Inc.*, et al, 3:12-cv-03816-CRB (Dkt. 272, entered
 9 June 30, 2015)). In that case, Craigslist sued 3taps alleging violations of the Computer Fraud and
 10 Abuse Act (“CFAA”) and related statutes. Craigslist alleged that 3taps had “mass copie[d] tens of
 11 millions of postings from craigslist in ‘real time’” from its website through automated data
 12 scraping, and then provided that data to “all manner of for-profit entities to copy, repurpose,
 13 redisplay, redistribute, surround with advertisements . . . and otherwise exploit commercially.”
 14 RJN Ex. 2 (*Craigslist*, First Amended Complaint (Dkt. 35, filed November 20, 2012)) ¶3. The
 15 central issue became whether Craigslist could impose CFAA liability on 3taps for accessing its
 16 website and servers “without authorization” after Craigslist had affirmatively withdrawn 3taps’s
 17 authorization through targeted cease and desist letters and the imposition of technological
 18 measures. Judge Breyer concluded that 3taps’s access to “Craigslist after the clear statements
 19 regarding authorization in the cease-and-desist letters and the technological measures to block
 20 them constitutes unauthorized access under the [CFAA]” (*Craigslist Inc. v. 3Taps Inc.*, 942 F.
 21 Supp. 2d 962, 969-70 (N.D. Cal. 2013)) and held that nothing in the text of the CFAA prevented
 22 Craigslist from revoking authorization to access its website, even though its website was
 23 generally accessible to the public. *Craigslist Inc. v. 3taps Inc.*, 964 F. Supp. 2d 1178, 1182-83
 24 (N.D. Cal. 2013). The case concluded with a stipulated permanent injunction enjoining 3taps as
 25 well as its CEO, Mr. Kidd, and Hard Yaka from accessing, copying, or downloading any content
 26 from the Craigslist website and circumventing technological measures that regulated access to the
 27 site. RJN Ex. 1.

On June 7, 2017, hiQ Labs, Inc. (“hiQ”) filed suit in this Court asserting unfair competition claims and seeking, among other things, a declaration that its scraping of member data from LinkedIn webpages did not violate the CFAA and other laws. *See* RJN Ex. 3 (*hiQ Labs, Inc. v. LinkedIn Corp.*, 3:17-cv-03301-EMC (Dkt. 1, entered June 7, 2017)). hiQ alleged that it scraped information from LinkedIn webpages for use in its commercial data analytics services, and that LinkedIn threatened hiQ with legal action and implemented technological barriers to prevent hiQ’s scraping for anticompetitive purposes—namely because LinkedIn planned to offer competing services. *See id.* at ¶¶2, 6-7, 17-18, 25, 30, 34. hiQ also alleged that it was specifically harmed because LinkedIn’s actions jeopardized several existing contracts and prospective economic relationships with several named companies, thereby threatening its entire business. *Id.* at ¶¶31, 50-54, 59-60, 64. On August 14, 2017, this Court granted hiQ a preliminary injunction restraining LinkedIn on unfair competition grounds from preventing hiQ’s access or use of member data on LinkedIn’s website. *See* RJN Ex. 4 (*hiQ Labs, Inc. v. LinkedIn Corp.*, 3:17-cv-03301-EMC (Dkt. 63, entered August 14, 2017)). During a July 15, 2022 hearing, this Court dissolved that injunction in light of the cessation of hiQ’s business and the lack of any ongoing likely irreparable harm. *See* RJN Ex. 20 (*hiQ Labs, Inc. v. LinkedIn Corp.*, 3:17-cv-03301-EMC (Dkt. 325, Transcript of July 15, 2022 hearing)) at 16.

After the injunction was first issued, 3taps saw an opportunity, but it wasn’t the normal one. Rather than return to Judge Breyer—who had adjudicated its dispute with Craigslist—3taps and its CEO instead tried to use a new investment to buy a relationship to hiQ. 3taps then created a dispute with LinkedIn and argued the dispute was related to the *hiQ* lawsuit in order to avoid an assignment to Judge Breyer. Specifically, within three months after this Court entered its preliminary injunction on behalf of hiQ, 3taps’s CEO Mr. Kidd (through his other company Hard Yaka) had fully negotiated and executed a promissory note for an eventual investment in hiQ. *See* Justice Decl. Ex. A (Redacted excerpts of HiQ Labs, Inc. Series C Preferred Stock Purchase Agreement). The papers converting the promissory note into hiQ shares were fully executed in January 2018, within two days of 3taps’s letter to LinkedIn asserting a desire to scrape LinkedIn. *Compare id.* (January 18, 2018 execution date on Kidd’s signature on Stock

Purchase Agreement), *with* RJN Ex. 5 (January 16, 2018 letter sent by 3taps, stating that “3taps intends to begin scraping publicly-available data from LinkedIn.com in the coming weeks, and does not intend to await the outcome of the [*hiQ*] appeal before initiating those activities”). The documents make clear that Hard Yaka had not previously owned any stake in hiQ, because its Series C shares, and its total shares are the same. Justice Decl. Ex. A.

On January 24, 2018, LinkedIn responded to 3taps’s letter by making clear that while any proposed scraping would be unauthorized, it did not then have any intention of initiating a lawsuit against 3taps. RJN Ex. 6. Specifically, LinkedIn stated that it “does not intend to consider legal action with respect to 3taps’s January 16, 2018 letter until the Ninth Circuit renders its decision.” *Id.* While LinkedIn’s letter did note that 3taps’s proposed course of conduct would be “unauthorized,” LinkedIn threatened no legal or other action against 3taps and expressly stated that LinkedIn had no intention of taking immediate action against 3taps. *See id.* That was the sum total of the parties’ communications—initiated entirely by 3taps—prior to suit.

Two weeks later, 3taps filed its Complaint in this action claiming it had a controversy with LinkedIn over the CFAA. *See generally* 3Taps, Inc.’s Complaint for Declaratory Judgment Against LinkedIn Corporation, Dkt. 1 (“Complaint”). 3taps then filed a motion to have its case related to the *hiQ v. LinkedIn* case pending before Judge Chen. *See* RJN Ex. 7 (*hiQ Labs Inc. v. LinkedIn Corp.*, 3:17-cv-03301-EMC (Dkt. 96, filed on February 14, 2018)). In that motion, 3taps stated that it and hiQ are “not completely unrelated” and “[a]s noted in 3taps’ complaint against LinkedIn, 3taps and hiQ have common partial owners.” *Id.* at 1 n.1. 3taps also claimed that the “facts leading to the filing of [the hiQ Case] are essentially identical to the facts” leading to this case, and that both 3taps and hiQ “received ‘cease-and desist’ letters from LinkedIn claiming that accessing the facts and information that LinkedIn makes publicly available on its website would violate the CFAA.” *Id.* at 1, 3. This case was then ordered related to the *hiQ v. LinkedIn* matter, and stayed pending the *hiQ* appeal. *See* RJN Ex. 8 (*hiQ Labs, Inc. v. LinkedIn Corp.*, 3:17-cv-03301-EMC (Dkt. 102, entered February 22, 2018)).

On August 13, 2021, after the stay expired, LinkedIn filed a motion to dismiss the Complaint for lack of subject matter jurisdiction. Dkt. 51. After filing its opposition (Dkt. 53),

1 3taps proposed—and LinkedIn agreed—that 3taps amend its Complaint, and the parties filed a
 2 stipulation to that effect, which the Court granted. *See* Dkt. 55. On October 5, 2021, 3taps filed
 3 its Amended Complaint, which sought declaratory relief from the Court that 3taps’s proposed
 4 scraping of LinkedIn profiles would not violate the CFAA, California Penal Code § 502, or
 5 prohibitions on common law trespass. *See* Dkt. 59. LinkedIn once again moved for dismissal on
 6 jurisdictional grounds, arguing (1) that 3taps failed to allege any actual or imminent redressable
 7 injury, (2) that 3taps failed to demonstrate a ripe controversy, and (3) that the Court should use its
 8 considerable discretion to dismiss the case due to 3taps’s unseemly judge shopping and because
 9 the requested relief would not resolve a concrete controversy or serve a useful purpose. *See* Dkt.
 10 61.

11 On April 7, 2022, this Court granted LinkedIn’s motion to dismiss the Amended
 12 Complaint for “lack of standing/ripeness,” but offered 3taps a further opportunity to plead facts
 13 showing a real and imminent harm it will suffer if not given the relief it sought. Dkt. 67 at 1. On
 14 May 12, 2022, 3taps filed the SAC. Dkt. 68.

15 **B. The Additional Manufactured Harm Alleged In The SAC.**

16 3taps previously attempted to tether its case to the *hiQ v. LinkedIn* matter by alleging that
 17 the *hiQ v. LinkedIn* case was “the dispute leading to this action,” and that 3taps intended to collect
 18 and use data “just as hiQ had been doing.” Dkt. 59, Am. Compl. ¶¶2, 12-13, 16. In the SAC,
 19 however, 3taps no longer claims to be just like hiQ, all but conceding there is no business
 20 similarity between what hiQ in fact was doing and what 3taps may theoretically do in the future.

21 In place of alleging similarity to hiQ, 3taps now relies on another business relationship
 22 manufactured by Mr. Kidd. Namely, 3taps states that “the immediate business use of LinkedIn’s
 23 scraped data by 3taps will be [REDACTED] Dkt.
 24 68, SAC ¶20. 3taps states that [REDACTED] (*id.*
 25 ¶21), [REDACTED]

26 [REDACTED] *See* RJN Exs. 9 [REDACTED]

27 [REDACTED] & 10 [REDACTED]

1 [REDACTED] Thus, the only fact that 3taps could muster
 2 to support its claim that it has an immediate need for LinkedIn member profile data, is that [REDACTED]
 3 [REDACTED] 3taps was unable to
 4 plead [REDACTED]²

5 Besides the addition of [REDACTED] 3taps
 6 again leans on the parties' pre-litigation correspondence as the basis for the threat of immediate
 7 harm against it. But 3taps ignores that it is the party who initiated the correspondence, and
 8 LinkedIn's response affirmatively dispelled any threat of immediate action against 3taps.
 9 Moreover, contrary to 3taps's allegation that LinkedIn threatened it with violation of the CFAA
 10 (SAC ¶¶15, 19, 28, 32), all LinkedIn asserted is that scraping by 3taps would be "unauthorized."
 11 RJN Ex. 6.

12 To substantiate its supposed standing as a legitimate business that "stands ready, willing,
 13 eager, and able to scrape" LinkedIn, 3taps points the Court to its website, calling it an online data
 14 shop. SAC ¶10. However, the www.3taps.com website, which is incorporated by reference into
 15 the SAC, tells a different story. The 3taps homepage states the company's mission is to "keep[]
 16 exchange-related data in the public domain." RJN Ex. 11 (3taps homepage). It contains links to
 17 two other pages: one dedicated to "Advocacy" and one for "Developers." *Id.* The "Advocacy"
 18 page provides information on 3taps's position that "public facts are public property." RJN Ex. 12
 19 (3taps Advocacy webpage). It also provides links to information about 3taps's fight with
 20 Craigslist and its "Open Access Manifesto." *Id.* 3taps's manifesto describes its mission as
 21 fighting "[f]oes of open access [who] abuse legal constructs" and "protect[ing] the public
 22 domain." RJN Ex. 13 (3taps's Open Access Manifesto).

23 The "Developers" page, which 3taps describes in the SAC as a "One-Stop Shop for
 24 Developers" contains links to several purported APIs where developers can access data 3taps has
 25 scraped. *See* RJN Ex. 14 (3taps Developers webpage). However, all of the links on 3taps's
 26 "Developers" webpages are dead. *See* RJN Exs. 15-18. 3taps does not market or offer any data

27 ² 3taps also makes the non-specific allegation that it "has and/or will also provide scraped data to
 28 third parties via private contractual arrangements," (SAC ¶13) but does not identify any actual
 such transaction that the relief it seeks in this case would facilitate.

1 for sale and no developer can go onto 3taps's website and access its "One-Stop Shop" because no
 2 such shop exists. *Id.* Currently situated, 3taps's website shows its business is to engage in
 3 judicial advocacy, not to sell data to developers.

4 Further, besides pointing to its defunct web shop, 3taps fails to plead any other facts
 5 supporting its claim that it is ready, willing, and able to engage in business activity. For instance,
 6 3taps does not plead that it has any employees that would allow it to immediately engage in
 7 business activity, such as engineers, or sales or marketing teams. Indeed, 3taps's insistence that it
 8 is ready, willing, and able to engage in business activity using scraped LinkedIn data is directly
 9 contradicted by 3taps's inability to maintain its status as a valid corporation. 3taps has in fact not
 10 paid taxes in Delaware, its state of incorporation, for years, leading the Secretary of State of
 11 Delaware to "certify that [3taps Inc.] is no longer in existence and good standing under the laws
 12 of the state of Delaware having become inoperative and void the first day of March, A.D. 2020
 13 for non-payment of taxes." RJN Ex. 19.

14 ARGUMENT

15 A federal court is presumed to lack jurisdiction in a particular case unless the contrary
 16 affirmatively appears. Thus, the burden is on 3taps as the party asserting jurisdiction to prove its
 17 existence. *Crossbow Tech., Inc. v. YH Tech.*, 531 F. Supp. 2d 1117, 1119 (N.D. Cal. 2007)
 18 (citations omitted). Additionally, jurisdiction must exist *at the time of filing the*
 19 *complaint*. *Grupo Dataflux v. Atlas Glob. Grp.*, 541 U.S. 567, 570 (2004); *Keene Corp. v. United*
 20 *States*, 508 U.S. 200, 207 (1993); *Morongo Band of Mission Indians v. Cal. Bd. Of Equalization*,
 21 858 F.2d 1376, 1380 (9th Cir. 1988). In assessing whether 3taps has met its burden to show
 22 subject matter jurisdiction at the time of filing, the Court may consider factual material outside
 23 the pleadings so long as reasonable inferences are drawn in plaintiff's favor. *Edison*, 822 F. 3d at
 24 517.³ When considering a Rule 12(b)(1) motion to dismiss, the district court is free to hear
 25 evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes

26
 27 ³ 3taps did not object to the Court taking judicial notice of the correspondence between the parties
 28 relied upon in its Complaint, it simply offered its own interpretation of that correspondence. *See*
Plaintiff 3taps, Inc.'s Opposition to Defendant LinkedIn's Motion to Dismiss at 3-4 (hereafter
 "Opp.").

1 where necessary. *See Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). In such
 2 circumstances, “[n]o presumptive truthfulness attaches to plaintiff’s allegations, and the existence
 3 of disputed facts will not preclude the trial court from evaluating for itself the merits of
 4 jurisdictional claims.” *Id.*

5 As set forth below, it is apparent that 3taps has not met its burden. First, 3taps is a void
 6 corporation, and as such does not have capacity to bring suit not incident to winding up its
 7 business. Second, it has not shown any threat of particularized injury sufficient to confer
 8 standing. 3taps has not shown that LinkedIn has threatened it in any way whatsoever, let alone
 9 that LinkedIn is the source of imminent injury. Nor could it since 3taps cannot legally operate its
 10 business. Finally, the Court should exercise its considerable discretion to dismiss this declaratory
 11 relief action because of 3taps’s unseemly judicial shopping and attempts at manipulating facts to
 12 conjure a dispute where none exists.

13 **I. 3TAPS IS VOID AND LACKS CAPACITY TO BRING THIS LAWSUIT.**

14 3taps is a void corporation legally incapable of bringing this lawsuit. A corporation’s
 15 capacity to “sue or be sued” is determined by the “law under which it was organized.” Fed. R.
 16 Civ. P. 17(b)(2). 3taps is incorporated in Delaware, so the Court must apply Delaware law to
 17 determine if 3taps lacks capacity to sue.

18 Under Delaware law, 3taps is a void corporation lacking the power to sue. Under Del.
 19 Code Ann. tit. 8, § 510, if any corporation neglects or refuses to pay the State any franchise tax it
 20 owes, the charter of the corporation is void, and all powers conferred by law upon the corporation
 21 are declared inoperative, including the power to sue in court. *See* Del. Code Ann. tit. 8, § 510;
 22 *Transpolymer Indus., Inc. v. Chapel Main Corp.*, 582 A.2d 936, 1990 WL 168276, at *1 (Del.
 23 1990) (stating that, when corporation’s charter was revoked under section 510, corporation lost
 24 any standing to pursue appeal in court). The state of Delaware has declared that 3taps “is no
 25 longer in existence and good standing under the laws of the state of Delaware having become
 26 inoperative and void” for “having neglected or refused to pay their annual taxes.” RJN Ex. 19.
 27 Thus, as a void corporation, 3taps is no longer an existing company currently capable of bringing
 28 this suit.

1 Delaware provides a limited exception to this lack of capacity that does not apply to 3taps
 2 here. Delaware’s corporate wind-up statute permits corporations to bring or defend a suit for
 3 three years after dissolution, but only if that suit is incident to winding-up the corporation. *See*
 4 Del. Code Ann. tit. 8, § 278. And authority is split on whether voided corporations are entitled to
 5 avail themselves of § 278 at all, since they are void rather than in dissolution. This Court has
 6 found “more persuasive the approach followed by the Delaware Supreme Court—that void
 7 corporations lose their standing to pursue legal actions until the corporate status is restored.” *In*
 8 *re Apple iPod iTunes Antitrust Litig.*, No. 05-CV-0037 YGR, 2014 WL 6783763, at *4 (N.D. Cal.
 9 Nov. 25, 2014) (citation omitted); *see also Backyard Wrestling, Inc. v. Pro-Active Ent. Grp., Inc.*,
 10 398 F. App’x 299, 299–300 (9th Cir. 2010) (recognizing that under Delaware law a void
 11 corporation is not dissolved and does not have the capacity to bring suit while void); *Bd. of*
 12 *Managers of Soho Int’l Arts Condo. v. City of New York*, No. 01 Civ. 1226 (DAB), 2005 WL
 13 1153752, at *11 n.19 (S.D.N.Y. May 13, 2005) (“‘Dissolution’ of a corporation is a specific legal
 14 term and is not the legal equivalent of a corporation declared inactive for non-payment of
 15 franchise taxes.”).

16 Even if Delaware’s wind-up statute could apply to a void corporation like 3taps, it would
 17 not provide capacity to bring this case because the statute is limited to suits brought only for the
 18 purpose of winding up its business. *See City Investing Co. Liquidating Tr. v. Cont’l Cas. Co.*,
 19 624 A.2d 1191, 1194-95 (Del. 1993) (“In order to formalize the continued existence of corporate
 20 assets and to provide a mechanism for the assertion of claims *as part of the ‘winding up’ process*,
 21 the Delaware General Corporation Law continues the corporation’s existence by operation of
 22 law.” (emphasis added)). The Delaware Chancery Court has held that the three-year dissolution
 23 period exists “for the purpose of winding up [the company’s] corporate and business affairs” and
 24 that, during this period, the company “may not carry on any business for which it previously
 25 existed, but it may do that which is necessary to bring its former business affairs to a conclusion.”
 26 *In re Citadel Indus., Inc.*, 423 A.2d 500, 501 (Del. Ch. 1980); *Matthew v. Laudamiel*, No. CIV.A.
 27 5957-VCN, 2012 WL 605589, at *21 (Del. Ch. Feb. 21, 2012) (§ 278 ensures that a dissolved
 28 corporation maintains the authority and viability to sue “incident to the winding up of its affairs”);

1 *Territory of U.S. Virgin Islands v. Goldman, Sachs & Co.*, 937 A.2d 760, 789 (Del. Ch. 2007),
 2 *aff'd*, 956 A.2d 32 (Del. 2008) (purpose of § 278 ensures that “claimants against the corporation
 3 had a time period in which to assert claims against the dissolved corporation” while also
 4 providing shareholders of that corporation “repose from claims regarding the dissolved
 5 corporation” after three years).

6 3taps brings these claims not as part of winding down its business, but rather for the exact
 7 opposite purpose of “continuing the business for which said corporation shall have been
 8 established”—a purpose forbidden by § 278. *Addy v. Short*, 89 A.2d 136, 139 (Del. 1952)
 9 (“During the three-year period of winding up, the corporation functions exactly as it had
 10 functioned before dissolution, with the important qualification that its powers are limited to
 11 closing its affairs and do not extend to carrying on the business for which it was established.”);
 12 *Gamble v. Penn Val. Crude Oil Corp.*, 104 A.2d 257, 260 (Del. Ch. 1954) (“Under [§ 278] as
 13 construed by our Supreme Court a dissolved Delaware corporation has the power to close its
 14 affairs but not to carry on the business for which it was established.”). The relief 3taps seeks is a
 15 declaration that it may carry on the business of scraping. Such a lawsuit is not incident to
 16 winding up its business, but, rather, is a suit in furtherance of its alleged business. Delaware law
 17 does not permit a void corporation to bring such a suit.

18 **II. 3TAPS LACKS ARTICLE III STANDING BECAUSE IT FAILS TO ALLEGE** 19 **ANY ACTUAL OR IMMINENT REDRESSABLE INJURY.**

20 Article III standing requires an injury in fact. *TransUnion LLC v. Ramirez*, 141 S. Ct.
 21 2190, 2203 (2021); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), as revised (May 24, 2016).
 22 Plaintiff’s injury must be concrete and particularized, and actual or imminent, not conjectural or
 23 hypothetical. *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560-61 (1992). The “personal stake”
 24 required for subject matter jurisdiction ensures that “federal courts do not adjudicate hypothetical
 25 or abstract disputes.” *TransUnion*, 141 S. Ct. at 2203. The harm must be concrete and real, not
 26 abstract. *Id.* at 2203-04. It also must be redressable by the Court. *Id.* 3taps’s SAC fails to meet
 27 these requirements.
 28

1 First, 3taps fails to allege facts showing that it will suffer a concrete, real, or imminent
 2 harm in the absence of the requested declarations. Instead, 3taps misconstrues the parties'
 3 correspondence and relies on bare conclusory allegations devoid of any facts. For instance, 3taps
 4 states that “[b]ut for the threat of litigation by LinkedIn,” 3taps would immediately begin scraping
 5 from LinkedIn webpages. SAC ¶19. As evidenced by the correspondence between the parties,
 6 LinkedIn has made no such threat and specifically ruled out the possibility of taking immediate
 7 action against 3taps. RJN Ex. 6. Similarly, 3taps states that it is “harmed by its inability to
 8 scrape LinkedIn in that it is being denied a valuable resource (information regarding LinkedIn’s
 9 over half billion users) that is much sought after by data scrapers and their clients.” SAC ¶19.
 10 But 3taps does not allege that it has ever attempted to scrape data from LinkedIn webpages, nor
 11 does it allege that LinkedIn has ever taken action directed against 3taps specifically to hinder
 12 3taps’s ability to do so.

13 Further, 3taps provides only one fact explaining why LinkedIn data is valuable to its
 14 business. Namely, that it has [REDACTED]
 15 [REDACTED] SAC ¶20. [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED] *Id.* This Court should regard the
 19 prospect of this [REDACTED] with heavy skepticism, particularly
 20 when the SAC does not identify any other lost business opportunities and when the 3taps website
 21 to which the SAC points is nothing more than advocacy and dead links. Beyond this, 3taps
 22 makes only the conclusory allegation that LinkedIn data would be beneficial to its purported
 23 business and prospects. SAC ¶19. This threadbare, abstract, and hypothetical harm is
 24 insufficient. That 3taps failed to provide any factual allegations regarding legitimate business
 25 opportunities even after twice given the opportunity to amend shows there is no real and
 26 immediate harm. 3taps’s failure to articulate any harm that either (a) has occurred, or (b) is
 27 imminently threatened to occur, is dispositive as to subject matter jurisdiction. Without an
 28 immediate and concrete prospect of harm of the type normally adjudicated by federal courts, such

1 as physical, monetary, or reputational injury, 3taps simply does not have standing to bring its
2 claim. *See TransUnion*, 141 S. Ct at 2211.

3 Second, as a void corporation legally incapable of carrying on its business, the declaratory
4 relief 3taps seeks—that it will not violate certain laws or constitute a breach of contract or a
5 trespass “if it proceeds to access and use publicly-available facts and information from LinkedIn’s
6 webpage” (SAC ¶¶29, 34, 38, 43)—is incapable of redressing its alleged injury. *See Lujan*, 504
7 U.S. at 561 (standing requires that injury be redressable by a favorable decision); *Hobbs v.*
8 *Sprague*, 87 F. Supp. 2d 1007, 1012 (N.D. Cal. 2000) (no standing when court unable to discern
9 whether Plaintiff’s alleged injury would be redressed by a favorable decision). 3taps is not
10 legally capable of continuing its business activities. Consequently, any decision from this Court
11 would not free the way for 3taps to scrape LinkedIn, and as such would not redress its alleged
12 injury. *See California v. Texas*, 141 S. Ct. 2104, 2116 (2021) (Article III standing requires that
13 the requested remedy will redress plaintiff’s injuries); *Carney v. Adams*, 141 S. Ct. 493, 501
14 (2020) (Assertions by attorney that he wanted to be, and would apply to be, a judge on a
15 Delaware court, in the absence of any evidence that he was able and ready to apply in the
16 imminent future, were insufficient to show a concrete, particularized, and imminent injury-in-fact,
17 as would be required for Article III standing); *Mayfield v. United States*, 599 F.3d 964, 972–73
18 (9th Cir. 2010) (no standing when declaratory judgment would not provide relief or redress
19 injury); *United States v. State of Wash.*, 759 F.2d 1353, 1357 (9th Cir. 1985) (“Declaratory relief
20 should be denied when it will neither serve a useful purpose in clarifying and settling the legal
21 relations in issue nor terminate the proceedings and afford relief from the uncertainty and
22 controversy faced by the parties.”).

23 **III. THE AMENDED COMPLAINT DOES NOT DEMONSTRATE A RIPE** 24 **CONTROVERSY BETWEEN LINKEDIN AND 3TAPS.**

25 Article III jurisdiction requires an actual controversy that is imminent and concrete.
26 Declaratory relief is no exception: A party seeking relief under the Declaratory Judgment Act
27 must allege facts sufficient to establish the existence of such a controversy. *Shalaby v.*
28 *Jacobowitz*, No. C 03-0227-CRB, 2003 WL 1907664, at *2 (N.D. Cal. Apr. 11, 2003), *aff’d*, 138

1 F. App'x 10 (9th Cir. 2005). To determine whether a complaint rises to the level of an actual
 2 controversy, the court must examine whether “the facts alleged, under all the circumstances, show
 3 that there is a substantial controversy, between parties having adverse legal interests, of sufficient
 4 immediacy and reality to warrant the issuance of a declaratory judgment.” *MedImmune, Inc. v.*
 5 *Genentech, Inc.*, 549 U.S. 118, 127 (2007). “In other words, the adversarial relationship must
 6 reach the point where there is a specific need for the court to declare the rights of the parties.”
 7 *Millennium Lab'ys, Inc. v. eLab Consulting Servs.*, No. 12CV1109 JM DHB, 2012 WL 2721919,
 8 at *3 (S.D. Cal. July 9, 2012).

9 The controversy must be “definite and concrete.” *Pub. Serv. Comm'n of Utah v. Wycoff*
 10 *Co.*, 344 U.S. 237, 242–43 (1952). Where no “definite and concrete” case or controversy exists,
 11 the dispute seeks “an advisory opinion based on ‘a hypothetical state of facts.’” *Sobini Films v.*
 12 *Tri-Star Pictures Inc.*, No. CV 01-06615 ABC (RNBx), 2001 WL 1824039, at *2, (C.D. Cal.
 13 Nov. 21, 2001) (internal citation omitted). Such a dispute “fails to invoke federal court
 14 jurisdiction.” *Id.*; *Coffman v. Breeze Corps.*, 323 U.S. 316, 324 (1945) (declaratory judgment “is
 15 available in the federal courts only in cases involving an actual case or controversy . . . and it may
 16 not be made the medium for securing an advisory opinion in a controversy which has not arisen.”
 17 (internal citations omitted)).

18 The Amended Complaint fails to allege *any* facts showing a real and immediate
 19 controversy between 3taps and LinkedIn. 3taps's bald assertion that in 2018 it decided it wanted
 20 to collect data from LinkedIn webpages, that it “stands ready, willing, eager and able” to scrape
 21 data from LinkedIn's website, and “has the means and know how to begin doing so immediately,”
 22 fails to establish any scraping conduct, or definite plan to engage in scraping activity, giving rise
 23 to a substantial, immediate, and real controversy. *See Merit Healthcare Int'l, Inc. v. Merit Med.*
 24 *Sys., Inc.*, 721 Fed. Appx. 628, 630 (9th Cir. 2018) (declaratory judgment claim that there would
 25 be trademark confusion was insufficient where the plaintiff had not yet made any such sales nor
 26 alleged or offered proof that it had “imminent plans” to do so); *San Diego Cnty. Gun Rts. Comm.*
 27 *v. Reno*, 98 F.3d 1121, 1126–27 (9th Cir. 1996) (immediacy requirement not met when plaintiffs
 28 alleged they “wish and intend to engage in unspecified conduct” violating act without articulating

1 concrete plans to do so, and without identifying a threat of arrest or prosecution made against
 2 them). These vague and conclusory allegations are insufficient to establish a real controversy.
 3 *Giannini v. Am. Home Mortg. Servicing, Inc.*, No. C11-04489 TEH, 2012 WL 298254, at *4
 4 (N.D. Cal. Feb. 1, 2012) (dismissing action when complaint made only conclusory allegations
 5 regarding subject of declaratory request; factual allegations were insufficiently specific to sustain
 6 the declaratory judgment sought); *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 607–08 (D. Nev.
 7 2011) (Plaintiff failed to plead sufficient jurisdictional facts to establish a substantial case or
 8 controversy where trademark was not in use and Plaintiff did not show definite intent to begin
 9 using mark; vague and conclusory statements insufficient). 3taps cannot create an actual
 10 controversy by pointing to [REDACTED]
 11 The fact that 3taps failed to allege any real facts regarding its proposed activity beyond these bare
 12 conclusions and that 3taps failed to list [REDACTED] even after twice being given
 13 the opportunity to amend its complaint to include such facts, highlights its inability to do so.

14 Indeed, the lack of immediacy is evidenced by the fact that 3taps’s SAC does not provide
 15 any facts regarding actual steps it has taken to implement its plan to access and use data from
 16 LinkedIn’s servers, since it allegedly determined to do so in early 2018. 3taps’s failure to allege
 17 that it has taken any action in furtherance of its plan in nearly four years reveals that there is no
 18 real and immediate controversy; rather, what 3taps actually seeks in this matter is an
 19 impermissible advisory opinion based on unalleged hypothetical facts. *See Coffman*, 323 U.S. at
 20 324 (The declaratory judgment procedure “may not be made the medium for securing an advisory
 21 opinion in a controversy which has not arisen.” (internal citations omitted)).

22 3taps resorts to trying to manufacture an immediate, ripe controversy by misquoting its
 23 pre-suit correspondence with LinkedIn. Specifically, the SAC alleges that in response to a
 24 January 16, 2018 letter from 3taps’s counsel generically asserting that “3taps intends to begin
 25 scraping publicly-available data from LinkedIn.com in the coming weeks” (RJN Ex. 5), LinkedIn
 26 supposedly responded with a letter stating that “the CFAA prohibited 3taps from collecting and
 27 using data from LinkedIn’s publicly-available webpage.” SAC ¶15. Those words *do not appear*
 28 *in the letter in that fashion*. RJN Ex. 6. 3taps cobbled together different parts of a legal analysis

1 to make it sound like a specific threat. LinkedIn's letter does not threaten 3taps. Rather,
2 LinkedIn explicitly asserted it would not even consider legal action until after the *hiQ* appeal was
3 resolved. *Id.* at 2.

4 The reason for 3taps's attempted manufactured controversy is clear. 3taps and its primary
5 investor, Hard Yaka, attempted to manufacture a controversy to try to get out from under an
6 existing permanent injunction instead of going back to that judge and seeking relief in a proper
7 fashion. Hard Yaka and Mr. Kidd appear to have heard about the *hiQ* injunction, bought into
8 hiQ, and then tried to create a controversy like the one between LinkedIn and hiQ. LinkedIn did
9 not take the bait. 3taps's deliberate misrepresentation of LinkedIn's letter underscores the degree
10 to which this entire "dispute" is manufactured. Far from establishing a real and immediate
11 controversy as the SAC alleges, the pre-suit correspondence of the parties evidences the lack of
12 an immediate and real controversy. *See Purely Driven Prods., LLC v. Chillovino, LLC*, 171 F.
13 Supp. 3d 1016, 1019 (C.D. Cal. 2016) (finding "no case of actual controversy between the
14 parties" when "there is no evidence that Defendants have threatened to file or filed any
15 infringement claims against Plaintiffs, and Defendants expressly disclaimed threatening Plaintiffs
16 with an infringement action").

17 The SAC's failure to allege *any facts* about steps 3taps plans to take to scrape data from
18 LinkedIn webpages, its practical ability to do so, and failure to allege any business opportunity
19 [REDACTED] underscores that 3taps does not have now, and has never
20 had, an actual and concrete plan to scrape data from LinkedIn's servers. Because 3taps seeks a
21 declaration based on conduct it does not allege it has undertaken and has no concrete plans or
22 ability to undertake, the SAC fails to invoke this Court's declaratory judgment jurisdiction, and,
23 accordingly, it must be dismissed. *See Clark v. City of Seattle*, 899 F.3d 802, 809 (9th Cir. 2018)
24 (affirming dismissal when alleged harm was speculative and based on events that had not yet
25 occurred and may never occur, and holding that "[f]or a case to be ripe, it must present issues that
26 are 'definite and concrete,' not hypothetical or abstract").

27 ///
28

1 **IV. IN ALL EVENTS, THE COURT SHOULD EXERCISE ITS DISCRETION TO**
 2 **DISMISS.**

3 The Court has discretion to dismiss a declaratory relief case even where, unlike here,
 4 there is subject matter jurisdiction. *MedImmune*, 549 U.S. at 136 (courts have discretionary
 5 power to refuse declaratory relief cases). The Court should exercise its considerable discretion
 6 because 3taps has manufactured this lawsuit for the improper purpose of avoiding an existing
 7 permanent injunction and manufactured an alleged business opportunity in order to create the
 8 appearance of a real and imminent harm.

9 3taps misrepresented the nature of this purported dispute to avoid another judge of this
 10 Court and should not be permitted to maintain this action in equity in light of its conduct.
 11 Specifically, this case is a disguised effort to do away with Judge Breyer's injunction from the
 12 *Craigslist v. 3taps* case without meeting the required standard for doing so. The practical effect
 13 of Judge Breyer's injunction is that 3taps cannot freely engage in any scraping given the CFAA's
 14 prohibition on *knowing* access without authorization. Instead of attempting to dissolve that
 15 injunction through proper channels, 3taps has made repeated misrepresentations that this dispute
 16 is "related" to the *hiQ v. LinkedIn* matter in order to get before this Court and avoid Judge Breyer.
 17 Indeed, 3taps's Complaints and 3taps's motion to relate contain several misrepresentations;
 18 namely (1) that the *hiQ* dispute led to this dispute; (2) that 3taps wants to engage in the same
 19 activity as *hiQ*; (3) that LinkedIn sent 3taps a cease-and-desist letter accusing it of violating the
 20 CFAA similar to the letter sent to *hiQ*; and (4) that the facts of this case are nearly identical to the
 21 facts leading to the *hiQ* case. *See* Compl. ¶¶2, 16, 22; Am. Compl. ¶¶2, 16, 23, 27, 32; RJN Ex.
 22 7 at 1, 3. None of these assertions are true. The Court should not countenance this unseemly
 23 judge-shopping and should exercise its considerable discretion to dismiss this action.

24 3taps's gamesmanship is further evident from the fact that it manufactured [REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED] The Court

28 gave 3taps the opportunity to amend its pleading to "provide non-conclusory allegations as to
 how [3taps] has engaged in meaningful preparation to conduct data scraping activity." ECF No.

1 67 at 1. All 3taps has done is point to a dead website and [REDACTED]

2 [REDACTED]

3 There is no reason for the Court to expend its resources adjudicating an unripe dispute brought by

4 a void corporation whose true interest is legal advocacy. This case is a textbook example of the

5 kind of speculative declaratory relief claim the Court should use its discretion not to hear.

6 **CONCLUSION**

7 3taps lacks standing to pursue its declaratory relief claims, has failed to demonstrate an

8 actual controversy, and in all events the Court should exercise its discretion to dismiss this

9 unnecessary lawsuit brought for improper purposes.

10

11 Dated: August 1, 2022

Orrick, Herrington & Sutcliffe LLP

12 By: /s/ Annette L. Hurst

13 ANNETTE L. HURST

14 Attorneys for Defendant

15 LinkedIn Corporation

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